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Department of Defense DIRECTIVE

AD-A275 131



December 21, 1993
NUMBER 1332.30

ASD(P&R)

SUBJECT: Separation of Regular Commissioned Officers

- References:
- (a) DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause," February 12, 1986 (hereby canceled)
 - (b) Chapter 60 and Sections 618, 630, 654, 827, and 831 of title 10, United States Code
 - (c) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980
 - (d) DoD 5200.2-R, "DoD Personnel Security Program," January 1987, authorized by DoD Directive 5200.2, May 6, 1992
 - (e) Sections 801-940 of title 10, United States Code, "Uniform Code of Military Justice"

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A. REISSUANCE AND PURPOSE

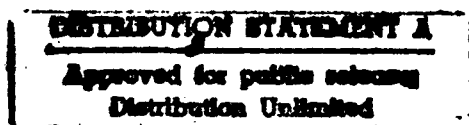
This Directive:

1. Reissues reference (a)
2. Implements Chapter 60 and Section 630 of reference (b) to update policy, responsibilities, and procedures governing the administrative separation of commissioned officers for substandard performance of duty, for an act or acts of misconduct or moral or professional dereliction, or in the interest of national security.
3. Implements Chapter 60 and Section 630 of reference (b) on the discharge of regular commissioned officers with less than 5 years active commissioned service in certain circumstances.

B. APPLICABILITY AND SCOPE

This Directive:

1. Applies to the Office of the Secretary of Defense (OSD) and to the Military Departments. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.
2. Applies to regular commissioned officers of the Military Services.
3. Does not apply to commissioned warrant officers and retired commissioned officers of the Military Services.



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C. DEFINITIONS

Terms used in this Directive are defined in enclosure 1.

D. POLICY

1. It is DoD policy to:

a. Promote the readiness of the Military Services by maintaining high standards of conduct and performance. An individual is permitted to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the nation have placed in his or her patriotism, valor, fidelity, and competence. Commissioned officers are expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times.

b. Judge the suitability of persons to serve in the Armed Forces on the basis of their conduct.

c. Separate from Military Service those commissioned officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence required of them to:

(1) Ensure that the Military Services meet rigorous and necessary standards of duty, performance, and discipline.

(2) Maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable Military Service.

2. Notwithstanding any other provision of this Directive, the Secretaries of the Military Departments concerned may discharge regular commissioned officers with less than 5 years active commissioned service from a Military Service when there is a need to reduce the number of officers in that Service to meet budgetary or force size requirements. Enclosure 6 applies to the discharge of probationary officers under this authority.

3. The Assistant Secretary of Defense for Personnel and Readiness (ASD(P&R)), in coordination with the Secretaries of the Military Departments, shall ensure that officers separated under this Directive are fully informed of assistance available from the Department of Defense to assist them in the transition to civilian life.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Personnel and Readiness shall supplement this Directive, as needed.

2. The Secretaries of the Military Departments shall:

a. Prescribe regulations consistent with the policy and procedures contained in this Directive.

b. Address any recommendations for policy changes in this Directive to the ASD(P&R).

F. PROCEDURES

Procedures and standards for implementation of the policy in section D., above, are in enclosures 2 through 8.

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective February 5, 1994.

2. This Directive applies only to administrative separation proceedings initiated on or after February 5, 1994, unless the Secretary of the Service concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.

3. Forward two copies of proposed implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 30 days of the signature date.



Enclosures - 8

1. Definitions
2. Reasons for Separation
3. Procedures for Nonprobationary Commissioned Officers
4. Composition of Boards
5. Board of Inquiry Procedures
6. Procedures for Certain Probationary Commissioned Officers
7. Character of Discharge
8. Guidelines for Fact-Finding Inquires into Homosexual Conduct

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DEFINITIONS

1. Active Commissioned Service. Service on active duty as a commissioned officer in a grade above warrant officer, W-4.
2. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.
3. Commissioned Officer. An officer in any of the Military Services who holds a grade and office under a commission signed by the President, other than a commissioned warrant officer or retired commissioned officer.
4. Convening Authority. The Secretary of the Military Department concerned who may delegate this responsibility as appropriate.
5. Counsel. A lawyer qualified under 10 U.S.C. 827 (b)(1) (reference (b)) or a civilian lawyer retained at the commissioned officer's expense.
6. Drug Abuse. As defined in DoD Directive 1010.4 (reference (c)).
7. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
8. Homosexual Act
 - a. Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and
 - b. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in paragraph 8.a., above.
9. Homosexual Conduct. A homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.
10. Legal Advisor. A judge advocate qualified under 10 U.S.C. 827 (b)(1) (reference (b)) and appointed to assist a Board of Inquiry.
11. Nonprobationary Commissioned Officer. A commissioned officer other than a probationary commissioned officer.
12. Probationary Commissioned Officer. A Commissioned officer with less than 5 years of active commissioned service; however, a regular commissioned officer serving on active duty on September 14, 1981, shall be a probationary commissioned officer for a period of 3 years from the date of his or her appointment as a regular commissioned officer.
13. Propensity. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.
14. Respondent. A commissioned officer required to show cause for retention on active duty.
15. Separation. Discharge, retirement, or resignation.

16. Sexual Orientation. A sexual attraction to individuals of a particular sex.

17. Show-Cause Authority. Any of the following as determined by the Secretary of the Military Department concerned:

a. Commanders exercising General Court Martial authority and all general or flag rank officers in command who have a judge advocate or legal advisor available.

b. The Secretary of the Military Department concerned or officers (not below the grade of major general or rear admiral) designated by the Secretaries of the Military Departments to determine, based on a record review, that an officer shall be required to show case for retention on active duty.

REASONS FOR SEPARATION

A. SUBSTANDARD PERFORMANCE OF DUTY

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when, as compared to other commissioned officers of his or her grade and experience, he or she is found to be substandard in any of the following respects:

1. Performance of duty.
2. Efficiency.
3. Leadership.
4. Lack of response to training, in that performance of duties in the officer's assigned speciality is precluded or impaired to the degree of being unsatisfactory.
5. Attitude or character.

B. ACTS OF MISCONDUCT OR MORAL OR PROFESSIONAL DERELICTION

A commissioned officer may be separated from the Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when he or she is found to have committed an act or acts of misconduct or moral or professional dereliction, which include (but are not limited to):

1. Serious or recurring wrongdoing, punishable by military or civilian authorities.
2. Intentional or discreditable mismanagement of personal affairs, including financial affairs.
3. Drug abuse.
4. Intentional neglect of, or failure to perform, assigned duties or complete required training.
5. Conduct resulting in the loss of professional status to such an extent as to impair performance of assigned military duties.
6. Intentional misrepresentation of facts in obtaining an appointment or in official statements or records.

C. HOMOSEXUAL CONDUCT

Homosexual conduct is grounds for separation from the Military Services. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct.

1. A commissioned officer shall be separated under this provision if one or more of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the officer has demonstrated that:

- (1) Such acts are a departure from the officer's usual and customary behavior;
- (2) Such acts under all the circumstances are unlikely to recur;
- (3) Such acts were not accomplished by use of force, coercion, or intimidation;
- (4) Under the particular circumstances of the case, the officer's continued presence in the Armed Forces is consistent with the interests of the Armed Forces in proper discipline, good order, and morale of the Service; and,
- (5) The officer does not have a propensity or intent to engage in homosexual acts.

b. The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the officer has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in homosexual acts or has a propensity or intent to do so. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence that he or she does not engage in homosexual acts and does not have a propensity or intent to do so. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether an officer has successfully rebutted the presumption that he or she engages in or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

- (1) Whether the officer has engaged in homosexual acts;
- (2) The officer's credibility;
- (3) Testimony from others about the officer's past conduct, character, and credibility;
- (4) The nature and circumstances of the officer's statement;
- (5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

c. The officer has married or attempted to marry a person known to be of the same sex (as evidenced by the external anatomy of the persons involved).

2. The commissioned officer shall bear the burden of proving, by a preponderance of the evidence, that retention is warranted under the limited circumstances described in paragraphs C.1.a. and C.1.b. of this enclosure, above, except in cases where the officer's conduct was solely the result of a desire to avoid or terminate military service.

3. Nothing in this Directive or the Service implementing regulations requires that an officer be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

a. The officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding military service; and

b. Separation of the officer would not be in the best interest of the Armed Forces.

D. RETENTION IS NOT CONSISTENT WITH THE INTERESTS OF NATIONAL SECURITY

Under DoD 5200.2-R (reference (d)), a commissioned officer may be separated from a Military Service when it is determined that the commissioned officer's retention is clearly inconsistent with the interest of national security.

E. MULTIPLE REASONS

A commissioned officer may be considered for separation under all the reasons in sections A., B., C., and D. of this enclosure above; however, separate findings under each applicable section shall be required as to the reasons for separation.

PROCEDURES FOR NONPROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The Secretary of each Military Department shall prescribe procedures for the initiation of separation recommendations.

B. SHOW-CAUSE AUTHORITY

1. The show-cause authority will determine whether an officer shall be required to show cause for retention on active duty for one or more of the reasons listed in enclosure 2, and as further defined by the Secretary of the Military Department concerned.

2. The show-cause authority shall:

a. Evaluate all information presented concerning the case under consideration.

b. Determine whether the record is sufficient to require the officer to show cause for retention on active duty.

c. Under regulations prescribed by the Secretary concerned, close the case if the authority determines that the officer should not be required to show cause for retention on active duty.

d. Report the matter for referral to a Board of Inquiry if the authority determines that the officer should be required to show cause for retention on active duty. The reasons for making such a determination shall be provided to the officer in writing.

e. Refer the case to a Board of Inquiry if the record supports a finding of homosexual conduct under enclosure 2.

f. Consider the initiation of separation action if the record supports a finding of drug abuse under enclosure 2.

3. As provided in 10 U.S.C. 618(b)(2) (reference (b)), the Secretary concerned may require an officer to show cause for retention on active duty based upon the recommendation of a promotion selection board.

C. BOARD OF INQUIRY

1. Composition. See enclosure 4.

2. Convening. A Board of Inquiry shall be convened under such regulations as may be prescribed by the Secretary of the Military Department concerned.

3. Function. A Board of Inquiry shall give a fair and impartial hearing to a respondent. The Board of Inquiry is an administrative board that shall consider all relevant and material evidence pertaining to the case and shall

function under rules and procedures established by the Secretary of the Military Department concerned. The Board of Inquiry shall make findings of fact and a recommendation as to whether a respondent should be retained on active duty. The board also shall recommend the character of discharge in accordance with regulations prescribed by the Secretary of the Military Department concerned, if it recommends discharge. Its findings must be supported by a preponderance of the evidence. The proceedings and hearing before a Board of Inquiry are intended to give the officer an opportunity to respond to, and rebut, the basis for the contemplated change of status, after having been informed of the contemplated change and the reasons therefor. The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken.

4. Determinations

a. If a Board of Inquiry determines that the respondent's retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Inquiry determines that the respondent's retention on active duty is not warranted, it shall report the matter to a Board of Review, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

D. BOARD OF REVIEW

1. Composition. See enclosure 4.

2. Convening. A Board of Review shall be convened under such regulations prescribed by the Secretary of the Military Department concerned.

3. Function. After a Board of Inquiry has determined a respondent has failed to establish that retention on active duty is warranted, the Board of Review shall review the record for the purpose of examining the grounds for such determination.

4. Determinations

a. If a Board of Review determines that the respondent has established that retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Review determines that the respondent has failed to establish that retention on active duty is warranted, the Board of Review shall recommend to the Secretary of the Military Department concerned that the respondent should be separated, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

E. ACTION BY THE SECRETARY OF THE MILITARY DEPARTMENT CONCERNED UPON
RECOMMENDATION OF THE BOARD OF REVIEW

If the Board of Review recommends that the respondent not be retained on active duty, the Secretary of the Military Department concerned may direct:

1. Separation.
2. Retention.

The action of the Secretary is final.

F. RETIREMENT OR DISCHARGE

1. Retirement. A commissioned officer separated from active duty in accordance with this Directive, if eligible for voluntary retirement under any provisions of law on the date of such separation, shall be retired in the grade and with the retired pay for which eligible if retired under such provision.

2. Discharge. A commissioned officer separated from active duty in accordance with this Directive, if ineligible for retirement under any provision of law on the date of such separation, shall be:

a. Honorably discharged in the grade then held if separated only for substandard performance of duty; or

b. Discharged in the grade then held if separated for misconduct, for moral or professional dereliction, homosexual conduct, or in the interest of national security. The character of discharge shall be determined by the Secretary of the Military Department concerned but in no case shall it be more severe than that recommended by the Board of Inquiry.

G. APPLICATION FOR RETIREMENT OR DISCHARGE

At any time before final action in the case, the Secretary of the Military Department concerned may grant a request by the commissioned officer concerned for:

1. Voluntary retirement.
2. Discharge.

The action of the Secretary is final.

H. LIMITATIONS

1. A commissioned officer required to show cause for retention on active duty because of substandard performance of duty and who is retained on active duty by a Board of Inquiry or a Board of Review may not again be required to show cause for retention for the same reasons within the one-year period beginning on the date of the determination to retain.

2. Subject to paragraph H.3., below, a commissioned officer required to show cause for retention on active duty because of misconduct, moral or professional dereliction, homosexual conduct, or in the interest of national security, and who is retained on active duty by a Board of Inquiry or a Board of Review may again be required to show cause for retention at any time.

3. A commissioned officer may not again be required to show cause for retention on active duty solely because of conduct that was the subject of the previous proceedings, unless the findings and recommendations of the

Board of Inquiry or Board of Review that considered the case are determined to have been the result of fraud or collusion.

COMPOSITION OF BOARDS

A. COMPOSITION

Each board convened in accordance with this Directive shall be composed of at least three commissioned officers having the qualifications prescribed by section B. of this enclosure. The senior member shall be the President of the Board. A nonvoting legal advisor may also be appointed to assist the Board of Inquiry.

B. OFFICERS ELIGIBLE TO SERVE ON BOARDS

1. Each commissioned officer who serves on a board must be an officer on the active duty list of the same Military Service as the respondent.

2. A commissioned officer may not serve on a board unless he or she is serving on active duty in a grade above lieutenant colonel or commander, and is senior in grade and rank to any respondent being considered by the board.

3. If qualified commissioned officers from the active duty list are not available in sufficient numbers to comprise a board, the Secretary of the Military Department concerned shall complete the membership of the board by appointing retired regular commissioned officers of the same Military Service. The retired grade of such officers must be above lieutenant colonel or commander and must be senior to the grade held by any respondent being considered by the board.

4. No person shall be a member of more than one board convened under this Directive to consider the same respondent.

BOARD OF INQUIRY PROCEDURES

A. CHALLENGES

Under regulations prescribed by the Secretary of the Military Department concerned, board members are subject to challenge for cause only. In the event the membership of the board is reduced to less than three officers, the convening authority shall appoint additional members.

B. LEGAL ADVISOR

The legal advisor, if appointed, shall perform such functions as the Secretary of the Military Department concerned may prescribe except that the legal advisor has no authority to dismiss any allegation against the respondent or to terminate the proceedings.

C. RECORDER

The Government may be represented before the board by a recorder whose duties shall be prescribed by the Secretary of the Military Department concerned.

D. RIGHTS OF A RESPONDENT REQUIRED TO SHOW CAUSE FOR RETENTION BEFORE A BOARD OF INQUIRY

1. When the case is referred to a Board of Inquiry, the respondent shall be notified in writing, at least 30 days before the hearing, of the reasons for which he or she shall be required to show cause for retention on active duty and of the least favorable characterization of discharge for which the officer may be recommended.

2. The respondent shall be allowed a reasonable period of time, as determined by the Board of Inquiry, to prepare his or her showing of cause for retention on active duty.

3. The respondent may appear in person at all proceedings of the Board of Inquiry.

4. The respondent may be represented either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice (if the counsel of choice is determined to be reasonably available under regulations prescribed by the Secretary of the Military Department concerned), but not by both. The respondent may employ civilian counsel, at no expense to the Government, in which case no military counsel shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall withhold any records that the Secretary of the Military Department concerned determines should be withheld in the interest of national security. When any records are withheld, the respondent shall be furnished, to the extent practicable, a summary of the records so withheld.

6. The respondent may request the appearance before the board of any witness whose testimony is considered to be pertinent to his or her case. A determination on the availability of the witness or whether the witness shall

be required to appear, and the materiality of the witness, shall be made pursuant to regulations of the Secretary of the Military Department concerned. Witnesses not on active duty must appear voluntarily and at no expense to the Government, except as otherwise authorized by the Secretary of the Military Department concerned.

7. Subject to regulations prescribed by the Secretary of the Military Department concerned, the respondent may submit, at any time before the board convenes or during the proceedings, documents from his or her record of service, letters, answers, depositions, sworn or unsworn statements, affidavits, certificates, or stipulations. These documents may include depositions of witnesses not deemed to be reasonably available or of witnesses unwilling to appear voluntarily.

8. The respondent may testify in his or her behalf subject to the provisions of 10 U.S.C. 831 (Article 31 of the Uniform Code of Military Justice) (reference (b)).

9. The respondent and his or her counsel may question any witness who appears before the board.

10. The respondent or counsel for the respondent may present oral or written argument, or both, on the matter to the board.

11. The respondent may, under regulations prescribed by the Secretary of the Military Department concerned, request a continuance, when necessary, for the preparation of his or her case before the board.

E. BOARD DETERMINATION

The Board of Inquiry shall decide the case on the evidence received or developed during open hearings. Voting shall be conducted in closed session with only voting members of the board in attendance. All findings and recommendations shall be determined by a majority vote.

F. REPORT OF PROCEEDINGS

The record of proceedings shall be kept in summarized form unless a verbatim record is required by the Show Cause Authority (SCA) or the Secretary of the Military Department concerned. In all cases, the findings and recommendations of the Board of Inquiry shall be stated in clear and concise language and shall be signed by all members concurring. Those members not concurring in the findings or recommendations, or both, may file a statement of nonconcurrence, and the reasons therefor, for inclusion in the record. The respondent shall be provided a copy of the report of the proceedings and the findings and recommendation of the board and shall be provided an opportunity to submit written comments for consideration by the Board of Review. When the Board of Inquiry determines that retention on active duty is warranted, and the case is closed, a summarized report of the proceedings may be prepared pursuant to regulations prescribed by the Secretary of the Military Department concerned.

PROCEDURES FOR PROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The SCA may initiate action for any of the reasons stated in enclosure 2 of this Directive, or for such other reasons as the Secretary of the Military Department concerned may prescribe by regulation. Prior to forwarding the record to the Secretary of the Military Department concerned, the commissioned officer shall be advised in writing of the following:

1. The reason action was initiated and the character of discharge recommended.
2. That he or she may tender a resignation.
3. That he or she may submit a rebuttal or declination statement instead of a resignation.
4. That he or she may confer with appointed or retained counsel.

The officer shall be permitted a reasonable period of time to prepare his or her response.

B. PROCESSING

1. If submitted, the resignation, with the record, shall be forwarded to the authority designated to take final action.

2. If the officer does not tender a voluntary resignation, or if voluntary resignation is not accepted by the Departmental Secretary, the case shall be returned to the SCA for action. If, under regulations of the Secretary concerned, the SCA determines the officer shall be separated with a general discharge, the SCA may refer the case to a Board of Officers or a Board of Inquiry, as determined appropriate, or submit the case to the Secretary concerned who will take a final action. If the SCA determines the officer should be separated with an Other Than Honorable Discharge, the SCA shall refer the case directly to a Board of Inquiry in accordance with Sections C, D, and E of enclosure 3.

3. If the commissioned officer does not tender a resignation statement, and an "Honorable" discharge is recommended by a Board of Inquiry, the record and any rebuttal shall be submitted to the Secretary of the Military Department concerned for final decision.

4. The Secretary of the Military Department concerned may direct referral of the record to a Board of Inquiry whenever the Secretary considers such action appropriate, and the case shall be processed in accordance with sections C., D., and E. of enclosure 3.

C. FINAL DETERMINATION

The Secretary of the Military Department concerned may direct:

1. Retention.
2. Discharge.

The action of the Secretary is final.

CHARACTER OF DISCHARGE

A. DISCHARGE FOR SUBSTANDARD PERFORMANCE OF DUTY

A discharge shall be characterized as "honorable" when substandard performance of duty is the sole basis for the discharge.

B. DISCHARGE FOR MISCONDUCT, OR FOR MORAL OR PROFESSIONAL DERELICTION, OR HOMOSEXUAL CONDUCT, OR IN THE INTERESTS OF NATIONAL SECURITY

A discharge shall be characterized as "Honorable," "General (Under Honorable Conditions)", or "Under Other Than Honorable Conditions."

1. Consideration. The character of a discharge shall be predicated on the commissioned officer's behavior and performance of duty while a member of a Military Service. Characterization normally shall be based on a pattern of behavior and duty performance rather than an isolated incident. There are circumstances, however, in which conduct reflected by a single incident may provide the basis for characterization.

2. Exceptions

a. A discharge shall be characterized as "Honorable" when the grounds for discharge are based solely on pre-Service activities, other than intentional misrepresentation, or omission of facts, in obtaining an appointment or in official statements or records.

b. A discharge shall be characterized as "Honorable" or "Under Honorable Conditions" when the sole basis for separation is homosexual conduct unless aggravated acts are included in the findings. A separation "Under Other Than Honorable Conditions" may be issued if there is a finding that the officer attempted, solicited, or committed a homosexual act:

- (1) By using force, coercion, or intimidation.
- (2) With a person under 16 years of age.
- (3) With a subordinate in circumstances that violate the customary military superior-subordinate relationship.
- (4) Openly in public view.
- (5) For compensation.
- (6) Aboard a military vessel or aircraft.
- (7) In another location subject to military control under aggravating circumstances, noted in the finding, that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT

A. RESPONSIBILITY

1. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned.

B. DEFINITIONS

1. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. Commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

3. Credible Information. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a Service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.

4. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

5. Homosexual Conduct. "Homosexual conduct" is a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person would believe (3) intends to convey the statement (4) that a person engages in or has a propensity or intent to engage in homosexual acts. This includes statements such as "I am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c. A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

d. "Propensity to engage in homosexual acts" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

6. Sexual Orientation. A sexual attraction to individuals of a particular sex.

C. BASIS FOR CONDUCTING INQUIRIES

A commander will initiate an inquiry only if he or she has credible information that a basis for discharge exists. A basis for discharge exists if:

1. The member has engaged in a homosexual act.
2. The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or
3. The member has married or attempted to marry a person of the same sex.

D. PROCEDURES

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, their sexual orientation. However, upon receipt of credible information of homosexual conduct, commanders or appointed inquiry officials may ask members if they engaged in homosexual conduct. But the member should first be advised of the DoD policy on homosexual conduct. Should the member choose not to discuss the matter further, the commander should consider other available information.

4. At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption that the Service member engages in homosexual acts or has a propensity or intent to do so. The Service member shall be given the opportunity to present evidence that he or she does not engage in homosexual acts and does not have a propensity or intent to do so.

6. The Service member bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, has a propensity to engage in, or intends to engage in homosexual acts.

E. CREDIBLE INFORMATION DOES NOT EXIST. FOR EXAMPLE, WHEN:

1. The individual is suspected of engaging in homosexual conduct, but there is no credible information, as defined, to support that suspicion; or
2. The only information is the opinions of others that a member is homosexual; or
3. The inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or
4. The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.

F. CREDIBLE INFORMATION EXISTS, FOR EXAMPLE, WHEN:

1. A reliable person states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or
2. A reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in or has a propensity or intent to engage in homosexual acts; or
3. A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe intended to convey the statement that the member engages in or has a propensity or intent to engage in homosexual acts.

G. LEGAL EFFECT

The procedures in this enclosure create no substantive or procedural rights.

SUPPLEMENTARY

INFORMATION

3

DEPARTMENT OF DEFENSE DIRECTIVES SYSTEM TRANSMITTAL

NUMBER	DATE	DISTRIBUTION
1332.30, Change 1	March 4, 1994	1000 Series

ATTACHMENTS

11 Pages

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APR 13 1994
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INSTRUCTIONS FOR RECIPIENTS

The following page and pen changes to DoD Directive 1332.30, "Separation of Regular Commissioned Officers," December 21, 1993, are authorized:

PAGE CHANGES

Remove: Pages 1&2, 1-1&1-2, 2-1 through 2-3, 6-1, and 8-1 through 8-3

Insert: Attached replacement pages

Changes appear on pages 1&2, 1-2, 2-1 through 2-3, 6-1, 8-1 through 8-3 and are indicated by marginal asterisks.

PEN CHANGES

Page 3.

Subsection E. 2. Change paragraph "b." to "c." and insert the following new paragraph: "b. Ensure, through their military commanders, that the policies, standards and procedures of this Directive are applied consistently, that fact-finding inquiries are conducted properly, that no abuse of authority occurs, and that failure to follow the provisions of this Directive results in appropriate corrective action."

Subsections G.1. and .2. Change "February 5, 1994" to "February 28, 1994"

EFFECTIVE DATE

The above changes are effective February 28, 1994. Forward one copy of revised implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 120 days.


JAMES L. ELMER

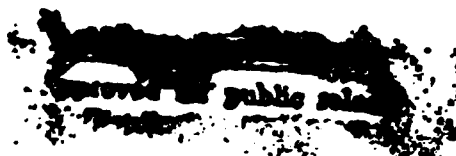
Director
Correspondence and Directives

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT

SD Form 106-1, MAR 84

PREVIOUS EDITIONS ARE OBSOLETE

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Department of Defense DIRECTIVE

December 21, 1993 #
NUMBER 1332.30

SUBJECT: Separation of Regular Commissioned Officers

- References:
- (a) DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause," February 12, 1986 (hereby canceled)
 - (b) Chapter 60 and Sections 618, 630, 654, 827, and 831 of title 10, United States Code
 - (c) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980
 - (d) DoD 5200.2-R, "DoD Personnel Security Program," January 1987, authorized by DoD Directive 5200.2, May 6, 1992
 - (e) Sections 801-940 of title 10, United States Code, "Uniform Code of Military Justice"
 - (f) DoD Instruction 5505.8, "Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations," February 28, 1994

A. REISSUANCE AND PURPOSE

This Directive:

1. Reissues reference (a)
2. Implements Chapter 60 and Section 630 of reference (b) to update policy, responsibilities, and procedures governing the administrative separation of commissioned officers for substandard performance of duty, for an act or acts of misconduct or moral or professional dereliction, or in the interest of national security.
3. Implements Chapter 60 and Section 630 of reference (b) on the discharge of regular commissioned officers with less than 5 years active commissioned service in certain circumstances.

B. APPLICABILITY AND SCOPE

This Directive:

1. Applies to the Office of the Secretary of Defense (OSD) and to the Military Departments. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.
2. Applies to regular commissioned officers of the Military Services.
3. Does not apply to commissioned warrant officers and retired commissioned officers of the Military Services.

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 1.

D. POLICY

1. It is DoD policy to:

a. Promote the readiness of the Military Services by maintaining high standards of conduct and performance. An individual is permitted to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the nation have placed in his or her patriotism, valor, fidelity, and competence. Commissioned officers are expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times.

b. Judge the suitability of persons to serve in the Armed Forces
* on the basis of their conduct and their ability to meet required standards *
* of duty performance and discipline. *

c. Separate from Military Service those commissioned officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence required of them to:

(1) Ensure that the Military Services meet rigorous and necessary standards of duty, performance, and discipline.

(2) Maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable Military Service.

2. Notwithstanding any other provision of this Directive, the Secretaries of the Military Departments concerned may discharge regular commissioned officers with less than 5 years active commissioned service from a Military Service when there is a need to reduce the number of officers in
* that Service to meet budgetary or force size requirements. The provisions of *
* Enclosure 6 do not apply to the discharge of probationary officers under this *
authority.

3. The Assistant Secretary of Defense for Personnel and Readiness (ASD(P&R)), in coordination with the Secretaries of the Military Departments, shall ensure that officers separated under this Directive are fully informed of assistance available from the Department of Defense to assist them in the transition to civilian life.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Personnel and Readiness shall supplement this Directive, as needed.

2. The Secretaries of the Military Departments shall:

a. Prescribe regulations consistent with the policy and procedures contained in this Directive.

DEFINITIONS

1. Active Commissioned Service. Service on active duty as a commissioned officer in a grade above warrant officer, W-4.
2. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.
3. Commissioned Officer. An officer in any of the Military Services who holds a grade and office under a commission signed by the President, other than a commissioned warrant officer or retired commissioned officer.
4. Convening Authority. The Secretary of the Military Department concerned who may delegate this responsibility as appropriate.
5. Counsel. A lawyer qualified under 10 U.S.C. 827 (b)(1) (reference (b)) or a civilian lawyer retained at the commissioned officer's expense.
6. Drug Abuse. As defined in DoD Directive 1010.4 (reference (c)).
7. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
8. Homosexual Act
 - a. Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and
 - b. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in paragraph 8.a., above.
9. Homosexual Conduct. A homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.
10. Legal Advisor. A judge advocate qualified under 10 U.S.C. 827 (b)(1) (reference (b)) and appointed to assist a Board of Inquiry.
11. Nonprobationary Commissioned Officer. A commissioned officer other than a probationary commissioned officer.
12. Probationary Commissioned Officer. A Commissioned officer with less than 5 years of active commissioned service; however, a regular commissioned officer serving on active duty on September 14, 1981, shall be a probationary commissioned officer for a period of 3 years from the date of his or her appointment as a regular commissioned officer.
13. Propensity. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.
14. Respondent. A commissioned officer required to show cause for retention on active duty.
15. Separation. Discharge, retirement, or resignation.

- * 16. Sexual Orientation. An abstract sexual preference for persons of *
- * a particular sex, as distinct from a propensity or intent to engage in *
- * sexual acts. *

17. Show-Cause Authority. Any of the following as determined by the Secretary of the Military Department concerned:

a. Commanders exercising General Court Martial authority and all general or flag rank officers in command who have a judge advocate or legal advisor available.

b. The Secretary of the Military Department concerned or officers (not below the grade of major general or rear admiral) designated by the Secretaries of the Military Departments to determine, based on a record review, that an officer shall be required to show cause for retention on active duty.

- * 18. Statement that a Member Is a Homosexual or Bisexual or Words to *
- * That Effect. Language or behavior that a reasonable person would *
- * believe was intended to convey the statement that a person engages in, *
- * attempts to engage in, or has a propensity or intent to engage in *
- * homosexual acts. *

REASONS FOR SEPARATION

A. SUBSTANDARD PERFORMANCE OF DUTY

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when, as compared to other commissioned officers of his or her grade and experience, he or she is found to be substandard in any of the following respects:

1. Performance of duty.
2. Efficiency.
3. Leadership.
4. Lack of response to training, in that performance of duties in the officer's assigned speciality is precluded or impaired to the degree of being unsatisfactory.
5. Attitude or character.

B. ACTS OF MISCONDUCT OR MORAL OR PROFESSIONAL DERELICTION

A commissioned officer may be separated from the Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when he or she is found to have committed an act or acts of misconduct or moral or professional dereliction, which include (but are not limited to):

1. Serious or recurring wrongdoing, punishable by military or civilian authorities.
2. Intentional or discreditable mismanagement of personal affairs, including financial affairs.
3. Drug abuse.
4. Intentional neglect of, or failure to perform, assigned duties or complete required training.
5. Conduct resulting in the loss of professional status to such an extent as to impair performance of assigned military duties.
6. Intentional misrepresentation of facts in obtaining an appointment or in official statements or records.

C. HOMOSEXUAL CONDUCT

- Homosexual conduct is grounds for separation from the Military Services
- * under the terms set forth in paragraph C.1.b., below. Homosexual conduct *
includes homosexual acts, a statement by a member that demonstrates a
propensity or intent to engage in homosexual acts, or a homosexual marriage or
attempted marriage. A statement by a member that demonstrates a
propensity or intent to engage in homosexual acts is grounds for separation
not because it reflects the member's sexual orientation, but because the
statement indicates a likelihood that the member engages in or will engage in
* homosexual acts. A member's sexual orientation is considered a personal *
* and private matter, and is not a bar to continued service under this *
* section unless manifested by homosexual conduct in the manner described in *
* section C.1. *

1. A commissioned officer shall be separated under this provision if one or more of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the officer has demonstrated that:

- (1) Such acts are a departure from the officer's usual and customary behavior;
- (2) Such acts under all the circumstances are unlikely to recur;
- (3) Such acts were not accomplished by use of force, coercion, or intimidation;
- (4) Under the particular circumstances of the case, the officer's continued presence in the Armed Forces is consistent with the interests of the Armed Forces in proper discipline, good order, and morale of the Service; and,
- (5) The officer does not have a propensity or intent to engage in homosexual acts.

b. The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the officer has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable *
* presumption that the officer engages in, attempts to engage in, has a *
* propensity to engage in, or intends to engage in homosexual acts. The *
officer shall be advised of this presumption and given the opportunity to *
* rebut the presumption by presenting evidence demonstrating that he or she *
* does not engage in, attempt to engage in, have a propensity to engage in or *
* intend to engage in homosexual acts. Propensity to engage in homosexual *
acts means more than an abstract preference or desire to engage in homosexual *
acts; it indicates a likelihood that a person engages in or will engage in *
homosexual acts. In determining whether an officer has successfully rebutted *
* the presumption that he or she engages in, attempts to engage in, or has a *
propensity or intent to engage in homosexual acts, some or all of the *
following may be considered:

- (1) Whether the officer has engaged in homosexual acts;
- (2) The officer's credibility;
- (3) Testimony from others about the officer's past conduct, character, and credibility;
- (4) The nature and circumstances of the officer's statement;
- (5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

c. The officer has married or attempted to marry a person known to be of the same sex (as evidenced by the external anatomy of the persons involved).

2. The commissioned officer shall bear the burden of proving
* throughout the proceedings, by a preponderance of the evidence, that *
* retention is warranted under the limited circumstances described in *
* paragraphs C.1.a. and C.1.b. of this enclosure, above. *

3. Nothing in this Directive or the Service implementing regulations requires that an officer be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

a. The officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding military service; and

b. Separation of the officer would not be in the best interest of the Armed Forces.

D. RETENTION IS NOT CONSISTENT WITH THE INTERESTS OF NATIONAL SECURITY

Under DoD 5200.2-R (reference (d)), a commissioned officer may be separated from a Military Service when it is determined that the commissioned officer's retention is clearly inconsistent with the interest of national security.

E. MULTIPLE REASONS

A commissioned officer may be considered for separation under all the reasons in sections A., B., C., and D. of this enclosure above; however, separate findings under each applicable section shall be required as to the reasons for separation.

PROCEDURES FOR CERTAIN PROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The SCA may initiate action for any of the reasons stated in enclosure 2 of this Directive, or for such other reasons as the Secretary of the Military Department concerned may prescribe by regulation. Prior to forwarding the record to the Secretary of the Military Department concerned, the commissioned officer shall be advised in writing of the following:

1. The reason action was initiated and the character of discharge recommended.
2. That he or she may tender a resignation.
3. That he or she may submit a rebuttal or declination statement instead of a resignation.
4. That he or she may confer with appointed or retained counsel.

The officer shall be permitted a reasonable period of time to prepare his or her response.

B. PROCESSING

1. If submitted, the resignation, with the record, shall be forwarded to the authority designated to take final action.

2. If the officer does not tender a voluntary resignation, or if voluntary resignation is not accepted by the Departmental Secretary, the case shall be returned to the SCA for action. If, under regulations of the Secretary concerned, the SCA determines the officer shall be separated with a general discharge, the SCA may refer the case to a Board of Officers or a Board of Inquiry, as determined appropriate, or submit the case to the Secretary concerned who will take a final action. If the SCA determines the officer should be separated with an Other Than Honorable Discharge, the SCA shall refer the case directly to a Board of Inquiry in accordance with Sections C, D, and E of enclosure 3.

3. If the commissioned officer does not tender a resignation statement, and an "Honorable" discharge is recommended by a Board of Inquiry, the record and any rebuttal shall be submitted to the Secretary of the Military Department concerned for final decision.

4. The Secretary of the Military Department concerned may direct referral of the record to a Board of Inquiry whenever the Secretary considers such action appropriate, and the case shall be processed in accordance with sections C., D., and E. of enclosure 3.

C. FINAL DETERMINATION

The Secretary of the Military Department concerned may direct:

1. Retention.
2. Discharge.

The action of the Secretary is final.

GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT

A. RESPONSIBILITY

1. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned.

* 5. The guidelines in this enclosure do not apply to activities of *
* Defense Criminal Investigative Organizations and other DoD law enforcement *
* organizations, which are governed by DoD Instruction 5505.8 (reference (f)). *

B. DEFINITIONS

1. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. Commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

* 3. Homosexual. A person, regardless of sex, who engages in, attempts to *
engage in, has a propensity to engage in, or intends to engage in homosexual acts.

* 4. Homosexual Conduct. "Homosexual conduct" is a homosexual act, a *
statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person *
* would believe (3) was intended to convey the statement (4) that a person *
* engages in, attempts to engage in, or has a propensity or intent to engage in *
* homosexual acts. This may include statements such as "I am a homosexual," "I *
am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c. A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

d. "Propensity to engage in homosexual acts" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

* 5. Sexual Orientation. An abstract sexual preference for persons of *
* a particular sex, as distinct from a propensity or intent to engage in *
* sexual acts. *

* C. BASES FOR CONDUCTING INQUIRIES *

* 1. A commander will initiate an inquiry only if he or she has credible *
* information that there is a basis for discharge. Credible information exists *
* when the information, considering its source and the surrounding circum- *
* stances, supports a reasonable belief that there is a basis for discharge. *
* It requires a determination based on articulable facts, not just a belief or *
* suspicion. *

* 2. A basis for discharge exists if: *

* a. The member has engaged in a homosexual act. *

* b. The member has said that he or she is a homosexual or bisexual, *
or made some other statement that indicates a propensity or intent to engage
in homosexual acts; or

* c. The member has married or attempted to marry a person of the same *
sex. *

* 3. Credible information does not exist, for example, when: *

* a. The individual is suspected of engaging in homosexual conduct, *
but there is no credible information, as described, to support that suspicion;
or

* b. The only information is the opinions of others that a member is *
homosexual; or

* c. The inquiry would be based on rumor, suspicion, or capricious *
claims concerning a member's sexual orientation; or

* d. The only information known is an associational activity such as *
going to a gay bar, possessing or reading homosexual publications, associating
with known homosexuals, or marching in a gay rights rally in civilian clothes.
Such activity, in and of itself, does not provide evidence of homosexual
conduct.

* 4. Credible information exists, for example, when: *

* a. A reliable person states that he or she observed or heard *
a Service member engaging in homosexual acts, or saying that he or she is a
homosexual or bisexual or is married to a member of the same sex; or

* b. A reliable person states that he or she heard, observed, or *
discovered a member make a spoken or written statement that a reasonable
person would believe was intended to convey the fact that he or she engages
in, attempts to engage in, or has a propensity or intent to engage in
homosexual acts; or

* c. A reliable person states that he or she observed behavior that *
amounts to a non-verbal statement by a member that he or she is a homosexual
or bisexual; i.e., behavior that a reasonable person would believe was
intended to convey the statement that the member engages in, attempts to
engage in, or has a propensity or intent to engage in homosexual acts. *

D. PROCEDURES

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual. However, upon receipt of credible information of homosexual conduct (as described in section C., above) commanders or appointed inquiry officials may ask members if they engaged in such conduct. But the member should first be advised of the DoD policy on homosexual conduct (and rights under Article 31, UCMJ, if applicable). Should the member choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceeding, nor does it provide the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

4. At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be given the opportunity to present evidence demonstrating that he or she does not engage in, attempt to engage in, or have a propensity or intent to engage in homosexual acts.

6. The Service member bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

* E. LEGAL EFFECT *

The procedures in this enclosure create no substantive or procedural rights.